

90-415

No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

October Term, 1989

ST CHARLES ASSOCIATES,

Petitioner,

v.

MANUEL LUJAN, SECRETARY,
DEPARTMENT OF THE INTERIOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

1. Under the authority of 26 U.S.C. 48(g)(2)(C), is the Department of the Interior authorized to disapprove a rehabilitation of an historic structure because of related new construction which affects the setting of the historic structure?

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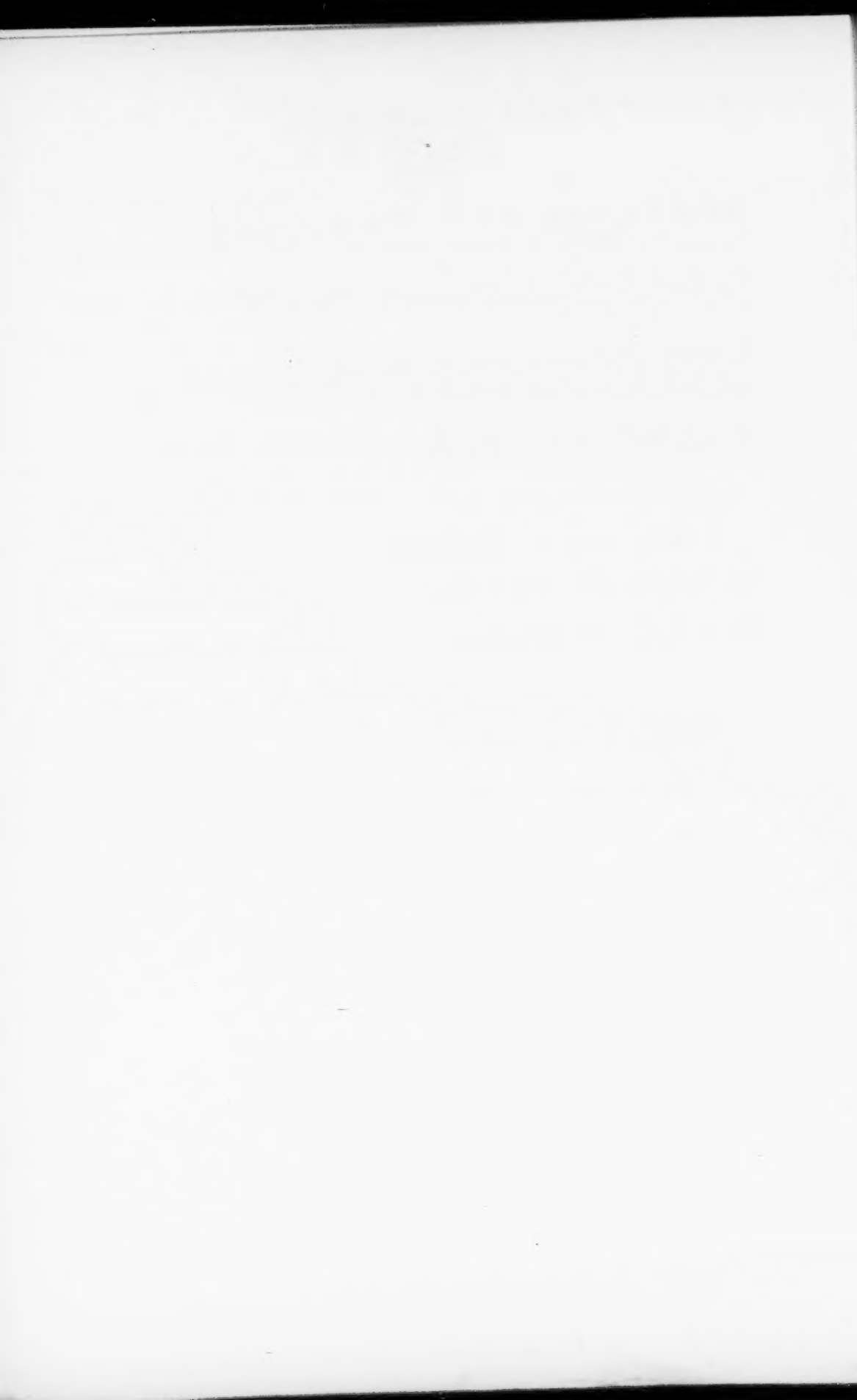
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REPORTS OF OPINIONS

The opinion of the Court of Appeals, Appendix, infra, p. 1, is unreported. The opinion of the District Court, Appendix, infra, p. 2, is reported at 672 F. Supp. 1074. The opinion of the District Court on remand, Appendix, infra, p. 29, is unreported. The administrative decision of the Department of the Interior, Appendix, infra, p. 34, is unreported.

STATEMENT OF JURISDICTIONAL GROUNDS

The order of the Court of Appeals for the Fourth Circuit is dated June 8, 1990. Jurisdiction of the Supreme Court to review the judgment by writ of certiorari is 28 U.S.C. 1254 (1).

STATUTES AND REGULATIONS

The Internal Revenue Code provided a 25% investment tax credit for the rehabilitation of a certified historic structure where the rehabilitation was approved by the Department of the Interior.

The relevant provisions of the Internal Revenue Code provided in pertinent part as follows:

26 U.S.C. 46(a)(2)(F)(i):

"(F) Rehabilitation Percentage.--For purposes of this paragraph--

(i) In general--

In the case of	The rehabilitation
qualified rehabili-	percentage is:
tation expenditures	
with respect to a :	

30-year building.....	15
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26 U.S.C. 48(g)(g)(2)(A):

"(g) Special Rules For Qualified Rehabilitated buildings.--

For purposes of this subpart--

(1) Qualified Rehabilitated Building Defined.--

(A) In General.--The term "qualified rehabilitated building" means any building (and its structural components)--

(i) which has been substantially rehabilitated,

(ii) which was placed in service before the beginning of the rehabilitation, and

(iii) 75 percent or more of the existing external walls of which are retained in place as external walls in the rehabilitation process."

26 U.S.C. Section 48(g)(2)(c):

"(C) Certified rehabilitation.--For purposes of subparagraph (B), the term 'certified rehabilitation' means any rehabilitation of a certified historic structure which the Secretary of the Interior has certified to the Secretary as being consistent with the historic character of such property or the district in which such property is located.

26 U.S.C. 48(g)(3):

Certified historic structure defined.--

(A) In general.--The term 'certified historic structure' means any building

(and its structural components) which--

— (i) is listed in the National Register, or

(ii) is located in a registered historic district and is certified by the Secretary of the Interior to the Secretary as being of historic significance to the district".

The Department of the Interior issued regulations to implement the authority given to approve rehabilitations of certified historic structures. The 1981 regulations provided in pertinent part as follows:

36 C.F.R. 67.6 (1981), "Standards for Rehabilitation":

(a) The following "Standards for Rehabilitation", a section of the Secretary's "Standards for Historic Preservation Projects", shall be used to determine if rehabilitation of a certified historic structure qualifies as "certified rehabilitation". The Standards shall be

applied taking into account the economic and technical feasibility of each project; in the final analysis, however, the rehabilitation must be consistent with the historic character of the structure and/or the district in which it is located.

(1) Every reasonable effort shall be made to provide a compatible use for a property which requires minimal alterations of the building, structure, or site and its environment, or to use a property for its originally intended purpose.

(2) The distinguishing original qualities or character of a building, structure, or site and its environment, shall not be destroyed. The removal or alteration of any historic material or distinctive architectural features should be avoided when possible.

(3) All buildings, structures, and sites shall be recognized as products of their own time. Alterations that have no

historical basis and which seek to create an earlier appearance shall be discouraged.

(4) Changes which may have taken place in the course of time are evidence of the history and development of a building, structure, or site and its environment. These changes may have acquired significance in their own right, and this significance shall be respected.

(5) Distinctive stylistic features or examples of skilled craftsmanship which characterize a building, structure, or site shall be treated with sensitivity.

(6) Deteriorated architectural features shall be repaired rather than replaced, wherever possible. In the event replacement is necessary, the new material should match the material being replaced in composition, design, color, texture, and other visual qualities. Repair or replacement of missing architectural features should be based on accurate

duplications rather than on conjectural designs or the availability of different architectural elements from other buildings or structures.

(7) The surface cleaning of structures shall be undertaken with the gentlest means possible. Sandblasting and other cleaning methods that will damage the historic building materials shall not be undertaken.

(8) Every reasonable effort shall be made to protect and preserve archeological resources affected by, or adjacent to any rehabilitation project.

(9) Contemporary design for alterations and additions to existing properties shall not be discouraged when such alterations and additions do not destroy significant historical, architectural, or cultural material, and such design is compatible with the size, scale, color, material, and character of the property, neighborhood or environment.

(10) Wherever possible, new additions or alterations to structures shall be done in such a manner that if such additions or alterations were to be removed in the future, the essential form and integrity of the structure would be unimpaired.

(b) Guidelines and other technical information to help property owners formulate plans for the rehabilitation, preservation, and continued use of historic properties consistent with the intent of the Secretary's "Standards for Rehabilitation" are available from the National Park Service, U.S. Department of the Interior, 440 G. St., N.W., Washington, D.C. 20243.

* * * * *

In 1984 the Department of the Interior issued amended regulations which included the following relevant additions to the 1981 regulations:

36 CFR 67.6(b)(1984):

"(A) rehabilitation project for

ation purposes encompasses all the significant interior and features of the certified structure(s) and its setting and ment, as determined by the y, and related demolition, tion or rehabilitation work which ect the historic qualities, ty or setting of the certified c structure(s).

R 67.6(e):

) Completed projects may be ed by an authorized representative Secretary to determine if the work he "Standards for Rehabilitation". cretary reserves the right to make tions at any time up to five years completion of the rehabilitation and oke a certification, after giving ner 30 days to comment on the , if it is determined that the litation project was not undertaken esented by the owner in his or her

application and supporting documentation, or the owner, upon obtaining certification, undertook unapproved further alterations as part of the rehabilitation project inconsistent with the Secretary's "Standards for Rehabilitation". The tax consequences of a revocation of certification will be determined by the Secretary of the Treasury.

STATEMENT OF THE CASE

This is a declaratory judgment action instituted to review a decision of the Department of the Interior denying approval of the rehabilitation of a certified historic structure. The District Court rendered a judgment for the Respondent Department of the Interior. Petitioner appealed to the United States Court of Appeals for the Fourth Judicial Circuit and that Court affirmed the District Court. The basis for Federal jurisdiction in the District Court was 28

U.S.C. 1331; 5 U.S.C. 701; 28 U.S.C.
2201.

Petitioner St. Charles Associates, LTD., a partnership, undertook the rehabilitation of a structure and sought the tax credit authorized by the Federal tax law for the rehabilitation of a certified historic structure. Under that law the Department of the Interior is charged with determining whether the rehabilitation of an historic structure is consistent with its historic character. In this case, Interior denied the approval because Petitioner constructed three new buildings adjacent to the historic structure and obscured the view of the historic structure. See the decision of the Department of Interior in the Appendix, infra, pp. 47-48. The question which Petitioner raises is whether under the authority of the law, Interior may deny the rehabilitation of a structure because of new construction which affects the setting of the structure.

ARGUMENT

The tax credit provisions of the Internal Revenue Code charge Interior with approving the "rehabilitation of a certified historic structure". 26 U.S.C. 48 (g)(2)(c). Congress defined "certified historic structure" as "any building (and its structural components)..." which meets certain historic criteria. 26 U.S.C. 48(g)(3). What occurred here was that Interior reviewed and disapproved not the rehabilitation of a certified historic structure but the placement of three new buildings, which impaired the view of the historic structure. See the administrative decision in the Appendix, infra, at p. 48.

The authority to review anything other than the rehabilitation of an existing building is not contained in the law. However, the lower court found the necessary authority in the purpose of the

law--encouraging the investment in and redevelopment of older properties while retaining their historic character.

Appendix, infra, p. 27. In reaching this conclusion, the lower court (and the Court of Appeals, which affirmed on the basis of the District Court decision) ignored the plain language of the statute to achieve the broader purpose of the law. This approach results in an expansion of the statute beyond the purpose manifested by the language. See Board of Governors v. Dimension Fin. Corp., 474 U.S. 361 (1986):

"The "plain purpose" of legislation, however, is determined in the first instance with reference to the plain language of the statute itself. Richards v. United States, 369 U.S. 1, 9, 82 S.Ct. 585, 590, 7 L.Ed. 2d 492 (1962). Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the "plain purpose" of legislation at the

expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

In addition to lack of adherence to legislative intent, there is a real question whether expansion of Interior's authority to include the setting and environment of a structure does achieve the purpose of encouraging the rehabilitation of historic structures. It may do just the opposite. Investors may be reluctant to grant Interior jurisdiction over any related new construction. This may be why Congress chose to limit Interior's authority to the structure itself.

Recent cases setting forth the plain language rule are Mallard v. U.S. Dist. Ct., 109 S.Ct. 1814 (1989); K. Mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988); Kaiser Aluminum and Chemical Corporation v. Bonjorno, 58 U.S.L.W. 4421 (Nos. 88-1595 and 88-1771, decided April 17, 1990).

This is an important question of Federal law for several reasons. The issue presented is one of basic jurisdiction--does the statute cover simply rehabilitation of an existing building, or does it extend to new construction as well which affects the setting or the environment of an historic building? One can hardly understand the meaning of the statute without knowing the answer to this question. Second, this is an important program for historic preservation. At the time of the hearing in the lower court, over 17,000 projects had been reviewed by Interior. The law has broad application to historic properties and to owners who undertake to rehabilitate them.

CONCLUSION

For the reasons stated, Petitioner requests the Court to issue its writ of certiorari to review the decision in the above case.

Respectfully submitted,

John C. Murphy
Attorney for Petitioner

APPENDIX

Opinion of the United States Court of Appeals for the Fourth Judicial Circuit, Case No. 89-2751, June 8, 1990:

PER CURIAM:

Plaintiff St. Charles Associates, Ltd., has appealed the district court's affirmance of the Department of the Interior's denial of the plaintiff's application for a tax credit for its restoration of an historic building. We find convincing the district court's thorough examination of the issues and adopt its reasoning as our own. St. Charles Associates, Ltd. v. United States, 671 F. Supp. 1074 (D.Md. 1987). The judgment of the district court is accordingly affirmed.

*We note that we previously ordered remand of the case for resolution of some factual ambiguities. Our affirmance today is of the original district court judgment as well as the judgment on remand.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

ST. CHARLES ASSOCIATES, LTD.:

V. : Civil
N-86-3818
UNITED STATES OF AMERICA :

MEMORANDUM

Under the inspiration and ownership of St. Charles Associates, Ltd., a former Catholic seminary, St. Charles College was converted into a retirement community called Charlestown. Following completion of the project, plaintiff sought final approval of the rehabilitation work done on the College from the National Park Service in order to qualify for a tax credit for the rehabilitation of certified historic structures established by the Tax Reform Act of 1976, Pub.L.No.94-455, 92 Stat. 1519, and Revenue Act of 1978, Pub.L.No. 95-900, 92 Stat. 2828 (current version at 26 U.S.C. 48(g)(1986). By letter of October 20, 1986, the Chief Appeals Officer for defendant, the

Department of the Interior("DOI"), denied approval for one portion of the project, a former dormitory known as the "College Building". Plaintiff instituted this suit to appeal that determination.

Presently before the Court are cross motions for summary judgment. After careful consideration of the pleadings filed by the parties, the Court finds that no hearing is necessary. Local Rule 6. For the reasons stated herein, the defendant's motion for summary judgment will be granted and plaintiff's motion denied.

The relevant facts are not in dispute. Plaintiff, St. Charles Associates, Ltd., owned a former Catholic seminary, St. Charles College, which consisted of seven structures located on a site of over 100 acres in Catonsville, Maryland. Among the buildings in the complex was a church, an administration building, a convent, a dining hall and most importantly for purposes of this

case, a dormitory built in 1961 known as the "College building".

In 1982, plaintiff formulated plans to convert the former seminary into a modern retirement community. As part of this project, John Erickson, President of Retirement Health Services Corporation, a general partner in St. Charles Associates, investigated the possibility of obtaining a federal tax credit which provided a percentage credit for certain rehabilitation costs of "certified historic structures". (Erickson affidavit). Section 48 (g) of the Internal Revenue Code charged the Secretary of the Interior ("Secretary"), under the aegis of the National Park Service ("NPS"), with making two classes of "certifications" precondition to eligibility for the tax credit. Thus, the Secretary was to ascertain whether a renovation was performed upon a "certified historic structure" ("Part I certification") and

whether the work performed qualified as a "certified rehabilitation" ("Part II certification"). Regulations for the issuance of these certifications were codified at 36 CFR Part 67.

In accordance with these regulations, in 1982, plaintiff submitted Part I and II applications, accompanied by detailed architectural drawings, for each of the seven buildings on the Charles College campus to the Maryland Historical Trust ("MHT"). No mention was made in these applications of long range plans for possible additional construction on the Charles College site. The documents were reviewed by MHT and forwarded to DOI with a recommendation that they be approved.

On July 21, 1983, DOI issued a determination that each of the seven buildings, including the College Building, qualified as a "certified historic structure". In addition, the department gave preliminary approval to plaintiff's

rehabilitation plans cautioning, however, that "(i)f changes to the approved plans are necessary as you proceed with the work, we caution you to to obtain in writing from the National Park Service a determination where such changes would enable the project to continue to meet the standards for Rehabilitation....any substantive change in the work as described in the application should be brought to our attention prior to execution to insure continued conformance to the Standards."(Defendant's Exhibit F).

Rehabilitation of the College

Building began shortly after receipt of DOI approval. On November 23, 1983, however, plaintiff was informed that Phase One approval of the College Building had been mistakenly granted due to a "clerical error", that the building was not a historic structure, and that the July 21 approval was revoked. ((Defendant's Exhibit 4). Substantial work had by this

time been performed on the College Building. Despite the revocation, plaintiff completed the renovation of the College Building in accordance with the plans previously submitted to DOI and began to assemble historical documentation to substantiate the contention that the College Building did in fact merit certification as an historic structure. By November 1984, rehabilitation of all seven buildings in original complex was complete.

By application dated December 5, 1984, plaintiff requested NPS certification of the completed rehabilitations of the seven buildings. (Defendant's Exhibit G). While this application was pending, plaintiff decided to initiate a second phase of construction on the Charles College site. In March 1985, plaintiff began work on "Phase Two" of the new retirement community, consisting of three buildings located contiguous to the College

Building. No information was provided to DOI about the new work.

Later that month, during the course of conducting an investigation of the Charles College site for the purpose of reviewing the application for certification, an official of the MHT learned of the phase two construction and notified the National Park Service of the new activity. (Defendant's Exhibit H). NPS then advised plaintiff that the certification requests for the original buildings could not be acted upon until additional information regarding the full scope of construction planned within the boundaries of St. Charles College was provided. (Defendant Exhibit 5). Plaintiff subsequently furnished NPS with the requested information.

On January 10, 1986, DOI issued a determination that the College Building was historic. Simultaneously with that ruling, however, the department also held

that the College Building had lost its character because of the rehabilitation performed upon it and the new construction adjacent to it. Shortly thereafter, on February 10, 1986, the NPS denied certification approval for the rehabilitation of all seven buildings. (Defendant's Exhibit A). Plaintiff immediately appealed this decision. After an inspection of the Charles College site, the Chief Appeals Officer, Dr. Ernest Connelly, issued a new decision on October 20, 1986 in which certification was granted for six of the structures, but denied for the College building. Dr. Connelly explained his action, in pertinent part, as follows:

My conclusion that the rehabilitation of the College Building does not meet the Secretary of the Interior's "Standards for Rehabilitation" and cannot be certified is based primarily on the fact that the historic character and identity of the building, as it existed before the rehabilitation, have been lost by the building's envelopment in the new construction of the additions to St. Charles College....

The new addition on the side of the College Building and the enlargement of the link between this structure and the Old Dormitory have re-oriented the structure away from the front of the campus. Furthermore, in the conversion of the St. Charles College campus into an extended care retirement community, several new buildings were constructed in front of the College Building. This new construction figured largely in the February 10, 1986, determination by the National Park Service that the entire development project failed the test of the "Standards for Rehabilitation". While disagreeing with this evaluation of the new construction as it affects the entire historic district, I concur that the new buildings have overwhelmed the College Building, visually severing its connection to the row of historic buildings of which it was consciously designed to provide one terminus. From the crucial point of view on the terrace in front of the Chapel, Administration Building and Old Dormitory, the College Building can be scarcely seen at all; it has been engulfed by the new buildings. Defendant's Exhibit C.).

Plaintiff filed the action at bar challenging the final administrative decision on the grounds that defendant improperly based its denial of rehabilitation certification upon the effect of adjacent new construction upon the College Building. In opposition to plaintiff's motion, and in support of its

own motion for summary judgment, defendant argues that the regulations governing plaintiff's application clearly indicated that the impact of new construction would be considered in determining whether to issue a certificate of rehabilitation. The primary issue, therefore, which faces the court is whether the regulations in effect at the time plaintiff submitted its certification application identified adjacent new construction as a factor that might be considered by DOI in determining whether to grant rehabilitation certification. As an alternate ground, Plaintiff contends that even if the regulations did encompass new construction, consideration of such construction is beyond the scope of authority granted to defendant by statute.

The Tax Reform Act of 1976, Pub.L. 94-455, 90 Stat. 1519, and the Revenue Act of 1978, Pub. L.95-600, 92 Stat. 2828 created tax incentives for certain

historic preservation work. Under 28 USC Section 48(g)(2), incentives were available for rehabilitation work done upon a "certified historic structure" where such renovation was certified as being consistent with the historic character" of the propeerty. The Act delegated responsiblity for making the requisite certification of rehabilitation work to the Secretary of the Interior.

Pursuant to this grant of authority, DOI promulgated regulations specifying procedures and standards to be used in considering certification requests. Regulations were first published in 1977, and then amended in 1981 at 36 C.F.R. Section 67. These regulations defined a "certified rehabilitation" as "any rehabilitation of a certified historic structure...which the Secretary has certified to the Secretary of the Treasury as being consistent with the historic character of such property, and where

applicable, with the district in which such property is located". 36 C.F.R. Section 67.2 (1981).

An applicant seeking rehabilitation certification for a planned rehabilitation project was directed to submit a description of the proposed project and any work in progress. Such plan would then be reviewed for conformity to the "Standards for Rehabilitation" established by the regulation. 36 C.F.R. Section 67.6(c)(1981). If the proposal comported with these regulations, a conditional approval would be issued which could be made final upon completion of the project if, as finished, it continued to meet the standards for rehabilitation. 36 C.F.R. Section 67.6(e)-(g)(1981). Responsibility was placed upon the applicant to keep DOI informed of any substantive changes to the plan made during the course of the rehabilitation. 36 C.F.R. Section 67.6(d)(1981). 1./

1/ Section 67.6 set forth the procedures for certification application, in pertinent part as follows:

Property owners desirous of having rehabilitations of certified historic structures certified by the Secretary as being consistent with the historic character of the structure or district in which the structure is located, thus qualifying as "certified rehabilitations", shall comply with the following procedures:

(a) Complete Part 2 of the "Historic Preservation Certification Application" and submit it to the SHPO. The application may describe a proposed rehabilitation project, work in progress, or a completed rehabilitation. In all cases, however, photographs showing the appearance of the structure prior to rehabilitation, both on the exterior and on the interior, must accompany the application. Other documentation, such as sketch plans and elevation drawings, may be necessary to evaluate certain rehabilitation projects. Where such documentation is not provided, review and evaluation cannot in some cases be completed. Owners who undertake rehabilitation projects without prior approval from the secretary do so at their own risk.

(b) If the work described in Part 2 of the application form is not completed, the appropriate SHPO shall review the proposed project as to whether or not the project is likely to meet the Secretary of the Interior's "Standards for Rehabilitation" and forward the application and written (sic) within 45 days of receipt of documentation detailed

in paragraph (a) of this section.

(c) Upon receipt of the application describing the proposed project and the recommendation of the SHPO, the Secretary shall determine, normally within 45 days, if the proposed project does not meet the "Standards for Rehabilitation". If the proposed project is consistent with the "Standards for Rehabilitation", the owner shall be advised of necessary revisions to meet such standards and be encouraged to work with the SHPO to bring the project into conformance. These notifications will be made in writing.

(d) Once a project has been approved, substantive changes in the work described in the application should be promptly brought to the attention of the secretary by letter to insure continued conformance to the standards: such changes do not require a new "Historic Preservation Certification Application".

(e) When the rehabilitation project has been completed, the owner shall notify the appropriate SHPO in writing of the project completion date and shall sign a statement that, in the owner's opinion, the completed rehabilitation meets the Secretary's "Standards for Rehabilitation" and is consistent with the work described in Part 2 of the "Historic Preservation Certification Application". At this time the owner will be requested to provide photographs of the completed rehabilitation project; other documentation that the SHPO believes is necessary to make a recommendation to the secretary; and his social security or taxpayer identification number. certifications will be issued to rehabilitations which have been carried out in accordance with the proposed plans

previously approved by the Secretary.

(f) The SHPO shall forward his recommendations as to certification to the Secretary within 45 days of receipt of the project completion date and documentation described in paragraph (e) of this Section.

(g) The completed project may be inspected by an authorized representative of the Secretary to determine if the work meets the "Standards for Rehabilitation". The Secretary reserves the right to make inspections at any time after completion of the rehabilitation and to withdraw certification of the rehabilitation project upon determining that the project does not meet or no longer meets the Secretary's "Standards for Rehabilitation" as completed. 36 C.F.R. 67.6(1981).

Section 67.7 set forth the standards by which a rehabilitation would be evaluated to determine whether certification should issue. Applicants were advised, -in pertinent part, that:

(1) Every reasonable effort shall be made to provide a compatible use for a property which requires minimal alterations of the building structure, or site and its environment, or to use a property for its originally intended purpose.

(2) The distinguishing original qualities or character of a building, structure, or site and its environment, shall not be destroyed. The removal or alteration of any historic material or

distinctive architectural features should be avoided when possible....

(4) Changes which have may have taken place in the course of time are evidence of the history and development of a building, structure, or site and its environment. These changes may have acquired significance in their own right, and this significance shall be recognized and respected. ...

(9) Contemporary design for alteration and additions to existing properties shall not be discouraged when such alterations and additions do not destroy significant historical, architectural, or cultural material, and such design is compatible with the size, scale, color, material, and character of the property, neighborhood or environment.

(10) Whenever possible, new additions or alterations to structures shall be done in such a manner that if such additions or alterations were to be removed in the future, the essential form and integrity of the structure would be unimpaired.

The regulations offered insight into how the standards would be used: "(they) shall be applied taking into consideration the economic and technical feasibility of each project: in the final analysis, however, the rehabilitation must be consistent with the historic character of

the structure and/or the district in which it is located". 36 C.F.R. Section 67.7(a) (1981).

In moving for summary judgment, plaintiff asserts that defendant invalidly employed a criterion not encompassed by these standards to deny certification for the College Building, namely, the effect of adjacent new construction upon a certified historic property. Pointing to language used in various standards, defendant argues that the standards clearly encompass not only the rehabilitation of a historic structure per se but also its site and environment. For example, standard two provides: "(t)he distinguishing original qualities or character of a building, structure, or site and its environment, shall not be destroyed...."(emphasis added). Defendant asserts that use of this phrase, which is reiterated in many of the standards, demonstrates that DOI intended to examine

areas beyond the structure itself in determining the acceptability of a rehabilitation project. Review would thus extend to a building's site and environment.

In response, plaintiff contends that the words building, structure and site are used as terms of art, the definitions of which are found in other regulations issued by the Department of the Interior, specifically those dealing with the National Register Program established by the National Historic Preservation Act of 1966, 80 Stat. 915, 16 U.S.C. Section 470a. The National Historic Preservation Act authorizes the Secretary of the Interior to "maintain a National Register of Historic Places composed of districts, sites, building, structures, and objects significant in American history...." 16 U.S.C. Section 470a(1)(A). Pursuant to this authorization, DOI promulgated regulations implementing the statute.

Relying upon the principle that statutes and regulations promulgated by the same authority and relating to the same subject matter are to be read together with consistent meanings, see Sutherland Stat. Const. Section 51.02 (4th Ed.), plaintiff urges that the word "site" in the regulations at issue should be given the same meaning assigned to that term in the National Register regulation. The Court disagrees. While later versions of the National Register regulations do contain a specific definition for the term "site", see e.g. 36 C.F.R. Section 60.3 (1984), the regulations in effect in 1981 contained no such definition. 36 CFR Section 60 et seq. Hence, the Court adheres to the maxim that words in a statute are generally to be accorded their ordinary meaning. Reed v. Health and Human Services, 774 F.2d 1270, 1274 (4th Cir., 1985).

Thus, the Court must examine the import of the oft repeated phrase "building, structure, or site and its environment" to determine whether it was intended to encompass new construction adjacent to, or connected with, a certified historic structure. After a close reading of the regulations, the Court finds that this phrase to be ambiguous. As punctuated, it appears that the word "environment" refers only to "site" and not to "building" or "structure". DOI's decision in the case at bar, as well as the affidavit of a National Park Service official, reveal that the agency itself has, however, consistently interpreted its regulations as embracing new construction in the immediate vicinity of an historic structure. See Declaration of H. Ward Jandl. In light of the well established principle that courts should defer to an agency's interpretation of its own

regulations, if that interpretation is reasonable, Monger v. Bowen, 817 F.2d 15, 18 (4th Cir., 1987), Hunter v. Director Office of Workers's Compensation, 803 F.2d 800 (4th Cir., 1986), the Court declines to construe the statute on the basis of an errant comma, but instead looks to the reasonableness of the agency's interpretation to determine the meaning of the contested regulations.

Upon reviewing the regulations and the material referenced therein as a whole, the Court finds the agency's interpretation is not only reasonable, but inescapable. While the wording of the standards may leave some doubt as to the scope of the rehabilitation review, any ambiguity is dispelled by consulting an additional publication referenced in, and recommended for use by the regulations. Section 67.7(b) notes that "Guidelines and other technical information to help property owners formulate plans for the

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rehabilitation, preservation and continued use of historic properties consistent with the intent of the Secretary's 'Standards for Rehabilitation' are available from the National Park Service...." The version of this publication available to plaintiff at the time the Charles College project was launched stated specifically,

The following guidelines are designed to help individual property owners formulate plans for the rehabilitation, preservation, and continued use of historic buildings consistent with the intent of the Secretary of the Interior's "Standards for Rehabilitation". The guidelines pertain to buildings of all occupancy and construction types, sizes and material. They apply to permanent and temporary construction on the exterior and interior of historic buildings as well as new attached or adjacent construction. (Defendant's Exhibit I).

The Guidelines contain a direct discussion of the perils of undertaking new construction without DOI approval. Under the heading "new construction" on page 11, the Guidelines recommend "keeping new additions and adjacent new construction to a minimum, making them

compatible in scale, building materials and texture". (emphasis added). Thus, the guidelines lend weighty support to the agency's interpretation of its regulations.

Subsequent amendments to the 1981 regulations also bolster this interpretation. In 1984, DOI issued revisions to Section 67.6(b) in order to "clarify the scope" of rehabilitation review for certification purposes. 49 Fed Reg. 9303 (1984). These revisions made explicit what has formerly been implicit by stating that:

(A) rehabilitation project for certification purposes encompasses all work on the significant interior and exterior features of the certified historic structure(s) and its setting and environment, as determined by the Secretary, and related demolition, construction or rehabilitation work which may affect the historic qualities, integrity or setting of the certified historic structure(s). 36 CFR section 67.6(b)(1984).

The standards for review under the 1984 regulations remained unchanged. Thus,

after viewing the regulatory scheme as a whole, the Court finds that the 1981 regulations did encompass new construction. 2

2. Plaintiff asserts that, even if new construction was included in the 1981 regulations, due to the ambiguity of those rules, defendant ought to be estopped from denying certification based upon new construction. Estoppel, however, requires the making of a definite misrepresentation of fact with reason to believe another will rely upon it. When a party seeks to assert estoppel against the government, this misrepresentation must amount to "'affirmative misconduct'", and "more than a mistake". Furcon v. United States, 626 F.Supp. 320, 323 (D.Md. 1986). Plaintiff has alleged no such facts upon which estoppel may be based in this case.

Next, the Court turns to Plaintiff's final argument that, in enacting regulations encompassing new construction, defendant exceeded its statutory grant of authority. As described above, 26 U.S.C. Section 48(g)(C) charges the Secretary of the Interior with certifying the rehabilitation of a certified historic structure "as being consistent with the historic character of such property...." A

"certified historic structure" is in turn defined as "any bulding (and its structural components)..." which meets certain historic criteria. 26 U.S.C. Section 48 (g)(3). Plaintiff argues that this statute restricts DOI inquiry to the actual historic structure, i.e., the building and its structural components.

Where a statute authorizes an agency to implement rules or regulations as may be necessary to carry out a delegated duty, "such regulations are to be sustained so long as they are 'reasonably related to the purposes of the enabling legislation', and are to to be given consideration by a reviewing court. United Hospital Center, Inc. v. Richardson, 757 F.2d 1445, 1451 (4th Cir. 1985), quoting Mourning v. Family Publications Service, Inc., 411 U.S. 356, 369, 93 S.Ct. 1652 (1973). "Moreover, in determining whether the regulations are within the purpose of the enabling legislation, the courts give

great deference to the interpretation given the statute by the officers or agency charged with its administration.'" Richardson, 757 F.2d at 1451, quoting Udall v. Tallman, 380 U.S. 1, 16, 85 S.Ct. 792, 801 (1965).

In this case the Court finds the regulations at issue fit neatly within the scope of the law's purpose of encouraging investment and redevelopment of older properties while retaining their historic character. Thus, the Court holds that these regulations, as they apply to rehabilitation certification, are within the Secretary of the Interior's statutorily granted authority.

For all of the above stated reasons, defendant's Motion for Summary Judgment will be granted.

Edward S. Northrop
Senior United States District Judge

Dated: 14 October 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
ST. CHARLES ASSOCIATES,
LTD. :

V. :Civil No.
N-86-3818
UNITED STATES OF AMERICA:

ORDER

In accordance with the foregoing Memorandum, and for the reasons stated therein, IT IS this 14 day of October, 1987, by the United States District Court of the District of Maryland, ORDERED:

1) That Defendant's Motion for Summary Judgment Be and the same hereby is GRANTED;

2) That Plaintiff's Motion for Summary Judgment BE and the same is hereby DENIED, and

3) That the Clerk shall mail copies of this Order to counsel in the case.

Edward S. Northrop
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ST. CHARLES ASSOCIATES, LTD. : CIVIL

Plaintiff : DOCKET

-VS- : N-86-3818

SECRETARY, UNITED STATES :

DEPARTMENT OF THE INTERIOR

DEFENDANTS

BALTIMORE, MARYLAND

June 16, 1989

THE ABOVE ENTITLED MATTER CAME ON
FOR A REMAND HEARING IN THE UNITED STATES
DISTRICT COURT BEFORE THE HONORABLE EDWARD
S. NORTHROP, BEGINNING AT 10:00O'CLOCK
A.M.

(EXERPT OF PROCEEDINGS CONTAINING RULING)

The Court: Now you have before you
all of the material that was in and that
will have to be determined at that time. I
do find that it seems to me that
whether--it doesn't make any difference,
but it seems to me that the concept, at
least, was existent prior to--it certainly

was existent in '84.

Mr. Murphy: Excuse me?

The Court: And it existed--and the concept was--became more--became clearer with the filing of the --of certain papers and by the testimony, and that during the period of time when the determination as to the historic position of the so-called College Building was being considered by the department, and that is admitted by Mr. Erickson, or I will reiterate it again, as I have done 3 or 4 times, that during that period of time that, while this was at least pending there, there were 6 or 7 hearings to attempt to obtain approval of the Department of the Interior, and reverse the original decision that it was not historical.

And it would appear to me that there was certainly an obligation to make at that time as it was as I ruled originally to make an obligation--that there was an

obligation that all surrounding buildings or settings of the historical building or any change thereto should certainly be submitted under the circumstances.

And I feel it seems to me that it was their obligation to do so and because of the fact that, certainly after April of '84, there was a specific and explicit regulation setting that forth. And as I ruled, and as I stated in my opinion, that there was an obligation to disclose anything of that nature prior to that time, it was implicit whereas it wasn't referred to in the regulation directly, it was set forth in various pamphlets and so forth given to the applicant for historical exemption.

— So it would appear to me and I do find as a fact, under the circumstances, that it was their obligation to indicate the three buildings which were new construction and which engulfed the historic so-called College Building. Okay.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
ST. CHARLES ASSOCIATES :
v. : Civil Action
UNITED STATES OF AMERICA : No. N-86-3818

ORDER

In accordance with the decision of the United States Court of Appeals for the Fourth Circuit remanding this case for further proceedings, a hearing was held in open court on June 16, 1989. At that time, testimony was taken, exhibits entered, oral argument heard and an oral opinion rendered.

For the reasons stated in open court, IT IS this 19th day of June, 1989, by the United States District Court for the District of Maryland, ORDERED:

1. That the Court's original order of October 14, 1987 BE and the same is hereby, AFFIRMED;
2. That the Charlestown development is found by this Court to have been

conceived as one project constructed in phases;

3. That the Clerk of Court shall enter this case as CLOSED on this Court's docket; and

4. That the Clerk of Court shall mail copies of this Order to counsel in this case.

Edward S. Northrop
Senior United States District Judge

UNITED STATES DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE

P.O. Box 3127

Washington, D.C. 20013-7127

October 20, 1985

Mr. John C. Erickson

President

Investment Planning Services

711 Maiden Choice Lane

Baltimore, Md. 21228

Re: St. Charles College Historic District,

711 Maiden Choice Lane, Baltimore,

Maryland

Properties:	Project Numbers:
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Power House	MD-83-0341
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College Dormitory	MD-83-0342
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Old Dormitory	MD-83-0343
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Convent	MD-83-0344
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Dining Hall	MD-83-0345
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Administration	MD-83-0347
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Taxpayer Identification Number:

59-1920843

Dear Mr. Erickson:

My review of your appeal of the decision of the Preservation Assistance Division, National Park Service, denying certification for the rehabilitation work on the properties cited above has been concluded. The appeal was made in accordance with the Department of the Interior regulations (36 CFR Part 67) governing historic preservation certifications for Federal income tax incentives provided in Section 212 of the Economic Recovery Tax act of 1981.

I wish to thank you and your associates for meeting with me in Washington on April 30, 1986, and for providing a complete account of the factors in the project. In order to give full consideration to the facts and circumstances particular to this case, including the points raised in our meeting, I made a site inspection of the property on May 21, 1986, and I appreciate that your staff architect was available to answer questions on that occasion. Also, I

acknowledge your letter of May 21, 1986, offering the donation of an easement to afford better protection for the forefront of the college ensemble. By my letter of June 24, 1986, such proposal for the restriction of future development was accepted as an additional part of the project for which certification was sought, and these were further discussed in our meeting in Washington on July 8, 1986. I have recieved a letter dated September 9, 1986, from the Director of the Maryland Historical Trust transmitting a copy of your deed of easement dated September 9, 1986, which I am assured is now in full legal effect.

With thoughtful attention to all the foregoing, I have determined that the rehabilitations of the Power House, the Convent, the Dining Hall, the Old Dormitory, and the Administration Building are consistent with the historic character

of the subject properties and the district in which they are located, and that these projects meet the Secretary of the Interior's "Standards for Rehabilitation". Therefore, the denial issued on February 10, 1986, by the National Park Service with respect to these structures is hereby reversed. I have further determined that the rehabilitation of the College Building is not in conformance with the historic character of the property, and the historic district in which it is located, and that this project does not meet the Secretary of the Interior's "Standards for Rehabilitation". Therefore, the February 10, 1986, decision of the Preservation Assistance Division is affirmed in this instance.

The work undertaken on the buildings comprising the St. Charles College Historic District is but a portion of a large and complex project involving both rehabilitation and new construction. The

involvement of the National Park Service has been extensive, reaching back to 1983 and including several appeals on the composition of the historic district, on the demolition of a non-contributing building, and other matters. It became apparent during this process that the total development should properly have been evaluated as a single project, rather than a collection of individual rehabilitations. This approach was adopted by the Preservation Assistance Division in its letter of February 10, 1986, denying certification of the entire project. Yet the history of the project does not admit to so reductive an approach; individual project applications were reviewed for the separate buildings, and unique project numbers assigned to each building. Therefore, in fairness to you, I have reviewed the matter both as a collection of individual projects and overall as the development of a single entity known as

the St. Charles College Historic District. Built in stages from 1911 to 1961, St. Charles College functioned as a seminary for the education of priests in the Roman Catholic church and was historically important as such an institution in the United States. The principal physical manifestation of that historical importance, as it has survived, rests in the architectural primacy of the historic fronts of the college buildings across the formal, terraced platform upon which the classically conceived buildings stand. This arrangement denotes the character of the structures as an organized grouping of buildings in a college campus. The configuration of these structures in an unbroken line looking out over the terrace and extensive playing fields in front boldly conveys the doubtless intended architectural impression of an imposing institution proclaiming its presence to the world, while retaining a certain

detachment from it. The preservation of this setting, so important to the overall character of the St. Charles College Historic District, has been ensured through the enlargement of the historic district boundaries, to include the terrace and playing fields, and through the accompanying donation to the Maryland Historical Trust of an easement encompassing the area in front of the principal buildings. As a result of these developments, the overriding character of this historic resource has been appropriately emphasized and maintained in the rehabilitation of the separate structures, with the sole exception of the 1961 College Building. The reasons behind this conclusion pertaining to each structure are given below.

In the rehabilitation of the Power House the large smokestack that formerly stood at the side of this building was demolished. The reservation Assistance

Division noted in its letter that this feature was "characteristic of structures of this type", which is true, and "should have been preserved". Nevertheless, the building retains its relationship to the other structures in the historic district. The Power House still appears as a utilitarian outbuilding serving the complex of larger structures behind which it stands. Consequently, in this case, the loss of the smokestack from the power plant it served has not adversely affected the historic district. The windows and door changes cited by the Preservation Assistance Division are in themselves slight changes to the building. They played no part in our extended meeting of April 30, 1986, and did not enter into my deliberations on this building.

The construction of a pedestrian bridge linking the Power House and the Dining Hall also figured in the previous National Park Service determination regarding these

structures, and also the Convent, which stands between them. Pedestrian walkways are never recommended, as they are generally out of character with the historic buildings to which they are attached, and they tend to reduce the independent structures to subordinate elements of a larger scheme. They also frequently block important views within historic districts. Moreover, construction of such features involves the removal of large amounts of historic fabric.

In this case, however, the deleterious effects normally produced by attaching such walkways to historic buildings are absent. The walkway links structures standing behind the larger buildings at the front of the complex. The visual prominence of the Chapel and pendant Administration Building and Old Dormitory is maintained from the front of the campus. My visit to the site confirmed that the historic subordination of Power

House, Convent and Dining Hall to these larger buildings is maintained. The back of the complex is still perceived as such; it would not be confused with the imposing front. Furthermore, with respect to the effect of the walkway on each of these three buildings, the historic prominence of the south elevation is maintained in each case. The bridge is constructed on the secondary north elevation. The primary south elevations of the Power House, Dining Hall, and Convent retain both their historic appearance and their prominence. As visitors entering the complex follow the main entrance road as it winds in front of the main buildings and continues behind them, they encounter the main facades of these three structures, before they approach the bridge, under which the road now passes. The sequence of buildings presented by the entrance road used historically is still maintained, as is the appearance of the buildings from that

road. Fianlly, I note that the loss of building fabric involved in the attachment of the bridge is virtually nil; in fact, it does not touch the convent at all. considering the circumstances, unique to thiis project, I find the walkway is accpetable.

Also cited in the decision of February 10, 1986, was the placement of ductwork on the exterior of the Convent and Dining Hall. I agree with the determination that such work has a negative effect on the appearance of the structures, and I accept your assurances that it will be screened. While the ductwork would not be grounds for denial of certification to the work done on these buildings, I appreciate your commitment to reduce the impact these unsightly elements have on the appearance of these two buildings.

Aspects of the rehabilitation of the 1961 College Bufliding (classroom and dormitory) found not to meet the "Standards for

Rehabilitation" include extensive interior demolition, the replacement of the original windows with new ones deemed incompatible with the character of the building, and the construction of a new and larger addition linking this building to the old dormitory. Figuring largely in the decision of the Preservation Assistance Division regarding the work on this structure, as with the work undertaken on all three buildings, considered as a single project, was the construction of three new buildings in front of the campus.

My conclusion that the rehabilitation of the College Building does not meet the Secretary of the Interior's "Standards for Rehabilitation" and cannot be certified is based primarily on the fact that the historic character and identity of the building, as it existed before the rehabilitation, have been lost by the building's envelopment in the new

construction of the additions to St. Charles College, rather than on the other issues cited in the previous decision by the National Park Service. In regard to the interior work, I note that it was described in the initial application for the project submitted in advance of the start of work, and approved by the National Park Service in its letter of July 21, 1983. You stated in our meeting that demolition work had been largely completed by the time you received a letter dated November 23, 1983, from the National Park Service, noting that inclusion of the 1961 building in the list of projects approved by the July 21 letter was a clerical error. Consequently, I accept your statement that you undertook the interior demolition work in good faith, relying on the written approval of the National Park Service. The loss of the interior room arrangement in this building is regrettable, and would otherwise itself

be grounds for denial of certification. As it is, however, the interior demolition must be considered as approved by the July 21, 1983, letter. I note your willingness to install horizontal bars on the windows in an effort to recapture the appearance of the original windows if doing so would gain certification of the rehabilitation of this structure. Considering the degree of alteration occasioned by the new construction, however, such a treatment would not be sufficient to overcome the larger effect on this structure brought about by the new work.

The new addition on the side of the College Building and the enlargement of the link between this structure and the Old Dormitory have re-oriented the structure away from the front of the campus. Furthermore, in the conversion of the St. Charles College Campus into an extended-care retirement community, several new buildings were constructed in

front of the College Building. This new construction figured largely in the February 10, 1986, determination by the National Park Service that the entire development failed the test of the "Standards for Rehabilitation". While disagreeing with this evaluation of the new construction as it affects the entire historic district, I concur that the new buildings have overwhelmed the College Building, visually severing its connection to the row of historic buildings of which it was consciously designed to provide one terminus. From the crucial point of view on the terrace in front of the Chapel, Administration Building and Old Dormitory, the College Building can be scarcely seen at all; it has been engulfed by the new buildings.

With the exception of its effect on the College Building, however, the new construction is otherwise wholly acceptable. The new buildings do not change

or interfere with the important architectural front of St. Charles College. Their construction has not destroyed any of the terrace that forms the socle for the principal buildings. The new buildings are situated off to one side of the dominant group and are fitted into the natural fall of the land. I note that the grade level of the new construction is approximately eleven feet lower than the wall height of the Old Dormitory and Administration Building. A conscious intention to design the new buildings to be subordinate to the old ones and to avoid confusion with them is obvious in the concept and result. Furthermore, it is equally evident that the new construction was carefully designed to be compatible in size, scale, color, texture, and detail. It reflects the style of the older structures without imitating it too closely. The materials of the new buildings harmonize with those of the

historic structures. On the whole, I find the added buildings to be quite sensitively done and consistent with the historic character of St. Charles College. Finally, with regard to the Administration Building and Old Dormitory, the previous determination by the National Park Service that these rehabilitations did not meet the Standards was not based on work performed on these structures, but on the effects of the new construction on the college campus as a whole. Since I find that the new buildings do not adversely affect any structure other than the College Building, the previous finding is hereby set aside. I wish to note, however, that I find the apartment in the main entrance of the Administration Building to be incongruous with the axial quality of the architecture and the importance of the terrace and its foreground.

Effective the date of this letter, the rehabilitations of the Power House,

Convent, Dining Hall, Administration Building and Old Dormitory are declared certified rehabilitations. The rehabilitation of the College Building is determined not to meet the Secretary of the Interior's "Standard's for Rehabilitation". As Department of the Interior regulations provide, my decision is the final administrative decision on certification. Questions concerning specific tax consequences of this decision or interpretations of the Internal Revenue Code of 1954 should be addressed to the appropriate Internal Revenue Service office.

Sincerely,

Ernest Allen Connelly
Chief Appeals Officer.